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10/31/2001 04:32:52 PM

Record Type: Record

To: Edward A. Boling Energy Task Force/CEQ/EOP

cc:

Subject: Comments on Interagency Task Force

James L. Connaughton, Chair
Council on Environmental Quality
Executive Office of the President

Dear Mr. Chairman:

Please find attached and embedded below the comments of 43 environmental and public health organization and individuals pertaining to the proposed nature and scope of the Interagency Task Force on the generation and transmission of electricity. See 66 Fed. Reg. 43,586 (August 20, 2001).

These comments have also been mailed to CEQ on October 31, 2001, via FedEx.

If you have any questions, please contact me. Thank you for your considerations of our comments.

Sincerely,

Jonathan F. Lewis
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Clean Air Task Force
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Before the
EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES
COUNCIL ON ENVIRONMENTAL QUALITY

Comments on: Notice and Request for Comments:
Energy Task Force, 66 Fed. Reg. 43,586 (August 20, 2001)

Submitted on: October 31, 2001

by: Alaska Clean Air Coalition
American Bottom Conservancy
Blue Ridge Environmental Defense League
Chemical Weapons Working Group

Clean Air Task Force
Committees for Law, Air, Water and Species (CLAWS)
Common Ground
Citizens Organized Watch, Inc.
Cumberland Countians for Peace & Justice
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Tennessee Environmental Council
Michael Thibodeaux
Toxics Action Center
United Church of Christ, Network for Environmental and Economic Responsibility
Valley Watch, Inc.
Martha Wickelhaus

The undersigned 43 non-profit environmental and public health organizations and concerned individuals are pleased to respond to the request by the Council on Environmental Quality (□CEQ□) for comment on the proposed nature and scope of the Interagency Energy Task Force (□Task Force□). We are especially interested in the premise underlying the creation and scoping of the Task Force □ namely that there is a need for streamlining and or expediting the permit review process for new energy facilities, particularly new power plants. The undersigned groups are active in representing their thousands of members before the Environmental Protection Agency (□EPA□), and in the courts, seeking public health and environmental improvements from the energy production and generation sector.

As a preliminary matter, we must express our concern at the bias of the

CEQ notice and other recent announcements by this Administration towards the streamlining or expediting of permits for new power plant facilities □ particularly new conventional pulverized coal plants. Although it is now clear that the energy shortages experienced earlier this year had more to do with market manipulation and bureaucratic blundering than with any shortfall in generating capacity, the Administration seemingly has seized upon the alleged □energy crisis□ to push for even more conventional coal combustion. The threats to public health and the environment posed by coal and coal combustion are well documented, and yet the Vice President has declared that □[c]oal is and . . . will continue to be a major, major source for us for power generation.□ In addition, Secretary Abraham has recently signaled the Department of Energy□s position that coal should figure prominently in our long-term energy strategy.

Because coal-fired power plants can remain in operation for more than fifty years, we are very concerned about the long-term consequences of the Administration□s support for new conventional coal plants. Public health and the public interest -- the fundamental bases for government regulatory oversight □ are not served by expediting new conventional coal plant development. We also are concerned about how the Administration□s support for conventional coal generation biases the nature and scope of the recently created Task Force. It would be extremely unfortunate indeed, from an environmental and public health standpoint, if the Energy Task Force is used by the Administration as a tool to try to promote new conventional coal-fired power plants by subverting existing procedural or public comment requirements in the Clean Air Act or other federal statutes.

As we will set forth in more detail below, the facts simply do not support industry□s (and the Administration□s) arguments about the need for streamlining or expediting permits for new electricity generating facilities. Finally, the 43 groups and individuals who submit these comments note that there can be no acceptable basis for limiting public participation in the permitting process. Indeed, we suggest some additional requirements that are needed to improve the permitting process to better account for and allow public comment on the public health effects of new energy production facilities. It should be clear, to all involved in the permitting process, exactly what the environmental and public health costs of a permit approval are.

I. Current Permitting Processes Have Neither Caused Any Shortage of New Plant Proposals Nor Any Electric System Reliability Problem

By focusing on □impediments to federal agencies□ completion of decisions about energy-related projects□ in the notice and request for comments on the Energy Task Force, the Administration implies that the environmental permitting process has hindered industry□s efforts to develop additional generating capacity and other energy projects. The Report of the National Energy Policy Development Group also bemoans what its authors perceive as a lack of regulatory certainty around environmental permitting.

The level of concern evinced by these statements is seriously misplaced. Since 2000, there has been an unprecedented increase in the permitting and construction of power generating stations. The North American Electricity Reliability Council (□NERC□) estimates that about 214,000 MW of installed capacity will be built between 2000 and 2005 □ an increase of over 30 percent above the current installed capacity

level. The decrease during the 1990s in the national reserve margin (the difference between installed capacity and projected peak demand), is currently being corrected by an enormous increase in investment in energy development □ and this is happening without any □streamlining□ of permitting processes. This is expected to occur in each of the country□s ten National Electricity Reliability Council reliability regions. Indeed, projections suggest there will be a □considerable supply surplus□ in several of the NERC regions.

The sharp increase in the development and construction of new capacity has been possible because of a correspondingly sharp increase in permitting. Compliance with Title V of the Clean Air Act, 42 U.S.C ? 7651 et seq., is the primary operating condition imposed by the Clean Air Act. A Title V permit must include provisions required under other sections of the Clean Air Act, including Prevention of Significant Deterioration (□PSD□) requirements in attainment areas, and New Source Review (□NSR□) requirements in nonattainment areas, although separate PSD and NSR permits also must be obtained. The regulations governing the issuance of Title V, PSD and NSR permits, which also provide minimum requirements for state permitting rules, require public input to the permitting process and an opportunity for those who have commented on a proposed permit to challenge its issuance. In addition, the development of an electric generating facility requires other environmental permits, such as NPDES permits under the Clean Water Act. EPA and state authorities responsible for issuing permits for energy facilities apparently have been able to fulfill their environmental regulatory obligations without impeding the development of new capacity, as recent permitting history suggests that there will soon be a glut of new power plants on the market. Any argument that there is a need to □streamline□ away protections found in Clean Air Act permitting requirements or in other federal statutes, in order to facilitate the permitting and development of MORE energy generating facilities clearly misunderstands or misrepresents the current situation.

a. NSR and PSD Requirements Are Not Adversely Affecting Industry□s Ability to Permit New Generating Sources

We also would like to take the opportunity to reiterate some points we have made in the context of the Administration□s 90-Day NSR Review process, about the Clean Air Act□s NSR and PSD requirements. It has been alleged by industry representatives that, but for restrictions posed by the NSR and PSD programs, there could be a great deal more additional generating capacity brought on line quickly which could help to alleviate potential power shortages. They have claimed that the NSR and PSD programs threaten electric system reliability both by chilling new power plant development and preventing older plants from running harder. Again, the facts tell a different story.

As applied to new power plants, the NSR and PSD provisions of the Clean Air Act require plants to meet modern standards and avoid the potential problem of a □rush to the bottom□ in which operators compete to build the dirtiest plants in order to reduce costs to a minimum. As applied to existing plants, the NSR and PSD requirements enforce the assumption implicit in the Clean Air Act that older units which were exempted from many of the Act□s requirements would eventually be retired and replaced by new, clean plants, or overhauled with modern pollution controls. Industry claims that new electricity generating plants are not being permitted because of NSR and PSD requirements. In fact, large numbers

of new plants are being permitted and constructed under the current permitting regime. As discussed above, 214,000 MW of cumulative new additions of generating capacity are expected by 2005. This is enough for the NERC to conclude, □Near term generation adequacy is deemed satisfactory.□ The NERC expects reserve margins in the 15-27% range, with 15% generally considered adequate.

Most of this new generation is fired by natural gas, and much of it is comparatively very clean. Many of the new gas-fired plants are significantly cleaner than the NSR (□LAER□) and PSD (□BACT□) standards. Gas has been the fuel of choice, because the economics of gas-fired plants are superior, and not only for NSR- or PSD-related reasons. But, as the outlook for gas prices became uncertain in the last year, many proposals surfaced for new coal-fired facilities. The gas market has stabilized over the last few months □ indeed wellhead prices at the end of September 2001 were at their lowest since March 1999. While there will continue to be fluctuations in the deregulated wholesale market for natural gas, mechanisms exist for hedging these risks, and we expect natural gas-fired units will continue to be economically, as well as environmentally, superior.

To the extent that there has been any reluctance to build new generation in recent years, it has not been because of environmental regulations. Rather, it has been as a result of utilities looking at an uncertain need for new capacity and being unwilling to make major new investments when faced with uncertain regulatory structures for recovery of costs. Furthermore, the recent economic downturn and recent problems in the stock market have meant that some companies planning to build new plants have not been able to obtain financing to take a permitted plant to construction □ but that is not a failing of the environmental permitting process.

b. NSR and PSD Requirements Are Not Adversely Affecting Electricity Reliability

Industry representatives further claimed, during the NSR 90-day review process, that various emissions permitting requirements prevent the rapid development of a significant amount of additional generating capacity which could help to alleviate potential power shortages. They assert that NSR, PSD, and other regulatory programs have threatened electric system reliability by discouraging new power plant development and prohibiting older plants from running harder. These allegations have not been substantiated, however.

As EPA and others have pointed out, capacity development during the 1990s declined primarily because investors and developers were adjusting to newly deregulated markets. Prior to deregulation, utilities were □guaranteed some level of return on their investment.□ In the 1990s, however, □[u]tilities were reluctant to make major investments in new plant capacity because of uncertainty about how the costs would be recovered and the risks of capital investment being stranded under deregulation.□ Development of installed capacity grew at approximately 0.9 percent during the 1990s, while demand increased by 2.7 percent during the same period. As a result, reserve margins have fallen significantly from peak levels in the 1980s.

The recent surge in the development of electricity generating capacity has reversed this trend. The estimated 214,000 MW of capacity that will be developed between 2000 and 2005 represents an increase of over 30 percent of current installed capacity. While long term projections are □more difficult to assess than the near term,□ NERC has stated that □if

current trends continue, long-term adequacy will also be satisfactory . . . . Capacity additions are increasingly being driven by market signals and not the maintenance of a prescribed capacity margin. This will likely lead to fluctuations in capacity margins that reflect normal business cycles experienced in other industries.□

c. New Source Development IS Impeded by the Use of Older Grandfathered Sources as Baseload Plants.

We would argue that a major impediment to the turnover of the U.S. power generation fleet is the fact that older conventional coal-fired power plants are continuing to be run as baseload facilities far past their 40 to 50 year birthdays □ which should have been the end of their useful lives. Their owners continue to run these plants, despite decreased generating efficiencies that are the hallmark of older facilities, because they are not subject to modern plant air pollution control standards, and therefore enjoy an economic advantage over newer sources. Although the retirement of equipment that has reached the end of its useful life is a part of the normal business cycle, this has not occurred with power plant facilities, because of the Clean Air Act loophole. In addition to the pure economics □ it□s cheaper to run an uncontrolled plant than a newer controlled plant □ the continued existence of older dirty plants means that there can be □no room in the airshed□ even for newer cleaner plants. In clean air areas, for example, there are maximum allowable increases in pollution and maximum concentrations of particular regulated pollutants. If there is an older uncontrolled source in an area, even bringing a new clean source on line can bump into these ceilings. By contrast, permanently retiring the old dirty unit would allow newer cleaner units to take its place, producing the same MW with fewer air emissions.

II. The Power Plant Permitting Process Must Include Procedural Protections That Serve as Environmental Protections □ Interagency Environmental Reviews, Opportunities for Public Comment and Meaningful Opportunities to Challenge Unacceptable Permit Approvals

New conventional pulverized coal power plants will cause considerable environmental damage and harm to human health. These plants emit high levels of NOx, SO2, and toxic mercury. Nitrogen oxides emissions alter human lung function, increase human susceptibility to respiratory illnesses, contribute to the formation of ozone smog and regional haze, and cause nitrogen saturation in forests and coastal waters. Sulfur emissions threaten our public health (contributing to asthma attacks, heart disease, lost workdays, school absences, and thousands of premature deaths each year) and degrade our environment (causing hazy parklands and city skylines, and acid rain-damaged ecosystems). Mercury contamination in fish is so prevalent that the health departments in forty states, cognizant of the severe neurological damage that mercury can cause in children, have issued thousands of fish consumption advisories. Collectively, these three air pollutants from conventional coal-fired power plants have damaged human health, wildlife, forest ecosystems and agriculture, water quality, and visibility.

Harmful emissions are only part of the problem, however. Conventional American coal plants also use tens of trillions of gallons of cooling water each year, altering ecosystems and killing countless fish and

other organisms that are drawn into the plants intake structures. Public health and environmental quality are threatened by dust and sediment that escapes from the coal piles that surround plants and from the trucks and trains that supply them. More than 100 million tons of highly toxic fossil fuel combustion waste ash, slag, and scrubber sludge contaminates our air, groundwater, and surface waters each year. Large tracts of land are consumed for the siting of coal plants and their associated storage areas, and our transportation infrastructure is taxed by the plants ceaseless demand for coal deliveries. Finally, the coal industry s reliance on surface mining techniques causes irreparable damage to local ecosystems and communities.

a. Interagency Environmental Reviews Must Be Preserved.

Several federal and state agencies are charged with overseeing and permitting the development of energy facilities, including power plants, and the extraction and use of natural resources such as coal, gas, and oil for the generation of electricity. These processes are regulated by the agencies under an interconnected set of federal environmental laws. Each of these laws including the Clean Air Act, the Clean Water Act, the Federal Land Policy and Management Act, the Endangered Species Act, and others reflect carefully constructed balances, both internal to themselves and as they relate to other environmental laws. Congress, in crafting each of these statutes, ensured that the nation s need for economic growth (including the energy demand increases which fuel that growth) would be considered in light of the need for environmental protection, and that the process would invite public participation. Federal permit programs like Title V, NSR, and PSD are the manifestation of Congress s intent to balance competing interests. As the practical embodiment of meticulous Congressional compromise, these permit programs are worthy of considerable deference. They cannot properly be characterized as impediments to development as the CEQ notice does. Nor is it legal or even appropriate for these rules to be changed at the behest of an appointed Task Force, without full notice and comment rulemaking and if necessary, legislative action.

b. The Interagency Task Force May Not Streamline Away Meaningful Opportunities for Public Participation in the Process Leading to Permit Issuance or in the Administrative and Judicial Review of Granted Permits.

At least one industry representative argued, in the context of the NSR 90-day review proceeding, in favor of doing away with current procedural requirements that the issuance of PSD permits be stayed pending the administrative and judicial review process. This suggestion would eviscerate the public s ability to participate meaningfully in permit review and appeals. Not only are such draconian results unnecessary, as we point out above, but, we assert, such an outcome would be against the law.

In particular, the argument is made that it is necessary to modify the current procedural requirement that various environmental permits cannot be issued and therefore construction of a facility cannot begin until the Environmental Appeals Board process is completed. Currently the rules result in an automatic stay of permit issuance during the time period between the granting of a permit and the deadline for challenges to that decision. The issuance of a permit is further stayed during any appeal. The effect of the current stay process is that significant investment in plant development cannot begin until after the appeals

process is complete.

Changing the automatic stay provision, either by removing it completely and allowing a permit to issue immediately upon approval, or by making a stay pending completion of the appeals process available only on the specific order of the Agency, would effectively remove the public□s ability to meaningfully participate in the permit and appeals process. For if a permit were issued and construction begun before the appeals process were complete, and the permit were remanded or revoked as a result of the administrative/judicial review process, who would be responsible for the sunk costs (both economic and environmental) already in the ground on that plant? If the answer is the party contesting the permit, that outcome would effectively stifle the private attorney general functions of non-profit citizens organizations □ which are fundamental to the framework of many federal environmental statutes.

Calpine argues that it tries to develop the cleanest possible generating technologies, but that the procedural protections incorporated in the automatic stay process have cost it delay and dollars. While we might be sympathetic to the argument that construction of the cleanest, most efficient generating facilities is desirable, we do not believe that this should □ or legally can □ occur at the cost of bypassing meaningful opportunities for public participation in the permitting and appeals process. That process is part of the transfer of portions of the bundle of rights in property and the public airshed, between the public and the applicant. The applicant receives, as the outcome of the permitting process, the right to develop the property, emit pollutants into the air and water, and generate revenue. In our democratic society in order to acquire those rights, the applicant must subject itself to public scrutiny.

Any effort to restrict or eliminate the public□s ability to participate in the permitting process furthermore would be in conflict with the central purposes of the Administrative Procedure Act (□APA□). By describing the rights and responsibilities of federal agencies and interested persons, the APA has provided structure and certainty to the procedures used by agencies in discharging their duties. The Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and Endangered Species Act all require public involvement in permit issuing processes, and this public participation is protected by the APA. The result has been more public oversight, improved access to administrative decision-making processes, and an increasingly responsible federal bureaucracy. Each of these fundamental achievements of modern American administrative law would be threatened if the public□s right to consider and critique agency permitting decisions were to be limited in order to expedite the issuance of permits. Furthermore, the APA requires that □any person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof.□ No change to the rules governing permitting or permit appeals legally may have the effect of denying or stifling the public□s right to seek redress for wrongly decided permitting decisions.

c. If the Permitting Process is to be Improved, Additional Public Health and Environmental Analyses Should Be Required of the Applicant as a Prerequisite to Permit Issuance.

The current permitting process fails to incorporate recent advances in the understanding of local adverse health impacts due to coal-fired power plants. First, although the national ambient air quality standard for fine particulate matter (PM2.5) is not yet formally required to be

taken into account in the permitting process, the science that led EPA to adopt that standard provides overwhelming evidence that PM2.5 is linked to a variety of adverse health outcomes including increased asthma attacks, respiratory and cardiac emergency room visits, hospitalizations, and even premature death. Recent studies have quantified the specific impacts associated with emissions from a particular power plant or plants. Second, although EPA has declined to set a short-term SO2 National Ambient Air Quality Standard, it recognized that the current standards are insufficient to protect people with asthma living in the vicinity of power plants from significant adverse health impacts caused by peak exposures due to plume □strikes.□ EPA has issued guidance to the states as to how to address this risk on a case-by-case basis. Current permitting processes fail to protect communities from these short-term peak SO2 exposures. Lastly, new coal plants must meet a specific technology standard for hazardous air pollutants (HAPs) under the Clean Air Act. However, unlike the standards applicable to existing HAP sources, new sources are not currently subject to a □residual risk□ analysis to determine whether they pose unacceptable risks to the local community. If the permitting process is to be changed, it should be strengthened to require assessment of and adequate protection against each of these risks.

d. Permitting Processes Also Could be Improved by Expanding Notice Requirements to Include all Downwind States and Communities.

Currently, PSD and Title V permitting rules include requirements that notice about the availability of the permit application and other information submitted by the applicant, as well as notice of the public hearing, be provided to all persons in the area where the proposed source is located. But pollution from these plants can travel great distances. Furthermore pollution transport science has become clear. In order to give adequate notice to all persons potentially affected by a new power plant, the rules should require notification not only within the area where a source is to be located, but also to all potentially affected downwind communities and states as well.

III. The Interagency Task Force Must Include Environmental Representatives□ Voices

The CEQ Notice requesting comment on the proposed Interagency Task Force suggests that the Task Force will be composed of representatives from the various federal agencies, as well as □such other representatives as may be determined by the Chairman of the Council on Environmental Quality.□ We respectfully suggest that environmental and public health organizations, particularly organizations active □in geographic areas where increased permitting activity is expected,□ deserve to have their voices represented on the Task Force. We therefore request that these organizations be offered the opportunity to participate in the Task Force deliberations.

Respectfully submitted,

_____

Ann Brewster Weeks
Jonathan F. Lewis
Counsel
Clean Air Task Force

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on behalf of:

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American Bottom Conservancy
Kathy Andria
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Environmental Action of Volusia-Flagler
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HealthLink
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Sent: Thursday, November 08, 2001 2:55 PM
To: Sarzynski, Andrea
Subject: Revised Comments on Energy Task Force


Revised CEQ Comments.CATF.do


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Jonathan Lewis <jlewis@clnatf.org>
11/08/2001 11:00:44 AM

Record Type: Record

To: Edward A. Boling Energy Task Force/CEQ/EOP@EOP

cc:
Subject: Revised Comments on Energy Task Force

November 8, 2001

By First Class Mail and E-mail

Mr. James L. Connaughton, Chair
Council on Environmental Quality
Executive Office of the President
17th and G Streets, NW
Washington, DC 20503

Re: Comments, Modified Only to Incorporate Additional Signatories, to Notice and Request for Comments, 66 Fed. Reg. 43,586-43,587 (August 20, 2001).

Dear Mr. Chairman:

On October 31, 2001, the Clean Air Task Force submitted comments on behalf of itself and 42 other organizations and individuals in response to the Council on Environmental Quality?s August 20, 2001 Notice and Request for Comments on the Federal Interagency Task Force for energy regulation.

Since then, three other organizations have indicated that they wish to sign on to the aforementioned comments. These organizations are:

Buckeye Environmental Network
Florida Public Interest Research Group

Our Children?s Earth Foundation

I have attached and embeddded below a set of comments that have been modified only to incorporate these additional signatories. No substantive changes have been made to the body of the comments. Clerical changes have been made only to the cover page, page one, page three, and to the list of signatories on pages 19-22. Please accept these comments in place of our previously filed comments. Thank you for your consideration.

Sincerely,
s/ Jonathan F. Lewis
Clean Air Task Force

****

REVISED TO INCORPORATE NEW SIGNATORIES ONLY

Before the

EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES
COUNCIL ON ENVIRONMENTAL QUALITY

Comments on: Notice and Request for Comments:
Energy Task Force, 66 Fed. Reg. 43,586 (August 20, 2001)

Submitted on: November 8, 2001

by:

Alaska Clean Air Coalition ? American Bottom Conservancy
Blue Ridge Environmental Defense League ? Buckeye Environmental Network
Chemical Weapons Working Group ? Clean Air Task Force
Committees for Law, Air, Water and Species (CLAWS) ? Common Ground
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Valley Watch, Inc. ? Martha Wickelhaus

The undersigned 46 non-profit environmental and public health organizations and concerned individuals are pleased to respond to the request by the Council on Environmental Quality (?CEQ?) for comment on

the proposed nature and scope of the Interagency Energy Task Force (?Task Force?). We are especially interested in the premise underlying the creation and scoping of the Task Force ? namely that there is a need for streamlining and or expediting the permit review process for new energy facilities, particularly new power plants. The undersigned groups are active in representing their thousands of members before the Environmental Protection Agency (?EPA?), and in the courts, seeking public health and environmental improvements from the energy production and generation sector.

As a preliminary matter, we must express our concern at the bias of the CEQ notice and other recent announcements by this Administration towards the streamlining or expediting of permits for new power plant facilities ? particularly new conventional pulverized coal plants. Although it is now clear that the energy shortages experienced earlier this year had more to do with market manipulation and bureaucratic blundering than with any shortfall in generating capacity, the Administration seemingly has seized upon the alleged ?energy crisis? to push for even more conventional coal combustion. The threats to public health and the environment posed by coal and coal combustion are well documented, and yet the Vice President has declared that ?[c]oal is and . . . will continue to be a major, major source for us for power generation.? In addition, Secretary Abraham has recently signaled the Department of Energy?s position that coal should figure prominently in our long-term energy strategy.

Because coal-fired power plants can remain in operation for more than fifty years, we are very concerned about the long-term consequences of the Administration?s support for new conventional coal plants. Public health and the public interest -- the fundamental bases for government regulatory oversight ? are not served by expediting new conventional coal plant development. We also are concerned about how the Administration?s support for conventional coal generation biases the nature and scope of the recently created Task Force. It would be extremely unfortunate indeed, from an environmental and public health standpoint, if the Energy Task Force is used by the Administration as a tool to try to promote new conventional coal-fired power plants by subverting existing procedural or public comment requirements in the Clean Air Act or other federal statutes.

As we will set forth in more detail below, the facts simply do not support industry?s (and the Administration?s) arguments about the need for streamlining or expediting permits for new electricity generating facilities. Finally, the 46 groups and individuals who submit these comments note that there can be no acceptable basis for limiting public participation in the permitting process. Indeed, we suggest some additional requirements that are needed to improve the permitting process to better account for and allow public comment on the public health effects of new energy production facilities. It should be clear, to all involved in the permitting process, exactly what the environmental and public health costs of a permit approval are.

I. Current Permitting Processes Have Neither Caused Any Shortage of New Plant Proposals Nor Any Electric System Reliability Problem

By focusing on ?impediments to federal agencies? completion of decisions about energy-related projects? in the notice and request for comments on the Energy Task Force, the Administration implies that the environmental permitting process has hindered industry?s efforts to develop additional generating capacity and other energy projects. The Report of the National Energy Policy Development Group also bemoans what its authors perceive as a lack of regulatory certainty around environmental permitting.

The level of concern evinced by these statements is seriously misplaced. Since 2000, there has been an unprecedented increase in the permitting and construction of power generating stations. The North American Electricity Reliability Council (?NERC?) estimates that about 214,000 MW of installed capacity will be built between 2000 and 2005 ? an increase of over 30 percent above the current installed capacity level. The decrease during the 1990s in the national reserve margin

(the difference between installed capacity and projected peak demand), is currently being corrected by an enormous increase in investment in energy development ? and this is happening without any ?streamlining? of permitting processes. This is expected to occur in each of the country?s ten National Electricity Reliability Council reliability regions. Indeed, projections suggest there will be a ?considerable supply surplus? in several of the NERC regions.

The sharp increase in the development and construction of new capacity has been possible because of a correspondingly sharp increase in permitting. Compliance with Title V of the Clean Air Act, 42 U.S.C ? 7651 et seq., is the primary operating condition imposed by the Clean Air Act. A Title V permit must include provisions required under other sections of the Clean Air Act, including Prevention of Significant Deterioration (?PSD?) requirements in attainment areas, and New Source Review (?NSR?) requirements in nonattainment areas, although separate PSD and NSR permits also must be obtained. The regulations governing the issuance of Title V, PSD and NSR permits, which also provide minimum requirements for state permitting rules, require public input to the permitting process and an opportunity for those who have commented on a proposed permit to challenge its issuance. In addition, the development of an electric generating facility requires other environmental permits, such as NPDES permits under the Clean Water Act. EPA and state authorities responsible for issuing permits for energy facilities apparently have been able to fulfill their environmental regulatory obligations without impeding the development of new capacity, as recent permitting history suggests that there will soon be a glut of new power plants on the market. Any argument that there is a need to ?streamline? away protections found in Clean Air Act permitting requirements or in other federal statutes, in order to facilitate the permitting and development of MORE energy generating facilities clearly misunderstands or misrepresents the current situation.

a. NSR and PSD Requirements Are Not Adversely Affecting Industry?s Ability to Permit New Generating Sources

We also would like to take the opportunity to reiterate some points we have made in the context of the Administration?s 90-Day NSR Review process, about the Clean Air Act?s NSR and PSD requirements. It has been alleged by industry representatives that, but for restrictions posed by the NSR and PSD programs, there could be a great deal more additional generating capacity brought on line quickly which could help to alleviate potential power shortages. They have claimed that the NSR and PSD programs threaten electric system reliability both by chilling new power plant development and preventing older plants from running harder. Again, the facts tell a different story.

As applied to new power plants, the NSR and PSD provisions of the Clean Air Act require plants to meet modern standards and avoid the potential problem of a ?rush to the bottom? in which operators compete to build the dirtiest plants in order to reduce costs to a minimum. As applied to existing plants, the NSR and PSD requirements enforce the assumption implicit in the Clean Air Act that older units which were exempted from many of the Act?s requirements would eventually be retired and replaced by new, clean plants, or overhauled with modern pollution controls.

Industry claims that new electricity generating plants are not being permitted because of NSR and PSD requirements. In fact, large numbers of new plants are being permitted and constructed under the current permitting regime. As discussed above, 214,000 MW of cumulative new additions of generating capacity are expected by 2005. This is enough for the NERC to conclude, ?Near term generation adequacy is deemed satisfactory.? The NERC expects reserve margins in the 15-27% range, with 15% generally considered adequate.

Most of this new generation is fired by natural gas, and much of it is comparatively very clean. Many of the new gas-fired plants are significantly cleaner than the NSR (?LAER?) and PSD (?BACT?) standards. Gas has been the fuel of choice, because the economics of gas-fired plants are superior, and not only for NSR- or PSD-related reasons. But, as the outlook for gas prices became uncertain in the last year, many

proposals surfaced for new coal-fired facilities. The gas market has stabilized over the last few months ? indeed wellhead prices at the end of September 2001 were at their lowest since March 1999. While there will continue to be fluctuations in the deregulated wholesale market for natural gas, mechanisms exist for hedging these risks, and we expect natural gas-fired units will continue to be economically, as well as environmentally, superior.

To the extent that there has been any reluctance to build new generation in recent years, it has not been because of environmental regulations. Rather, it has been as a result of utilities looking at an uncertain need for new capacity and being unwilling to make major new investments when faced with uncertain regulatory structures for recovery of costs. Furthermore, the recent economic downturn and recent problems in the stock market have meant that some companies planning to build new plants have not been able to obtain financing to take a permitted plant to construction ? but that is not a failing of the environmental permitting process.

b. NSR and PSD Requirements Are Not Adversely Affecting Electricity Reliability

Industry representatives further claimed, during the NSR 90-day review process, that various emissions permitting requirements prevent the rapid development of a significant amount of additional generating capacity which could help to alleviate potential power shortages. They assert that NSR, PSD, and other regulatory programs have threatened electric system reliability by discouraging new power plant development and prohibiting older plants from running harder. These allegations have not been substantiated, however.

As EPA and others have pointed out, capacity development during the 1990s declined primarily because investors and developers were adjusting to newly deregulated markets. Prior to deregulation, utilities were ?guaranteed some level of return on their investment.? In the 1990s, however, ?[u]tilities were reluctant to make major investments in new plant capacity because of uncertainty about how the costs would be recovered and the risks of capital investment being stranded under deregulation.? Development of installed capacity grew at approximately 0.9 percent during the 1990s, while demand increased by 2.7 percent during the same period. As a result, reserve margins have fallen significantly from peak levels in the 1980s.

The recent surge in the development of electricity generating capacity has reversed this trend. The estimated 214,000 MW of capacity that will be developed between 2000 and 2005 represents an increase of over 30 percent of current installed capacity. While long term projections are ?more difficult to assess than the near term,? NERC has stated that ?if current trends continue, long-term adequacy will also be satisfactory . . . . Capacity additions are increasingly being driven by market signals and not the maintenance of a prescribed capacity margin. This will likely lead to fluctuations in capacity margins that reflect normal business cycles experienced in other industries.?

c. New Source Development IS Impeded by the Use of Older Grandfathered Sources as Baseload Plants.

We would argue that a major impediment to the turnover of the U.S. power generation fleet is the fact that older conventional coal-fired power plants are continuing to be run as baseload facilities far past their 40 to 50 year birthdays ? which should have been the end of their useful lives. Their owners continue to run these plants, despite decreased generating efficiencies that are the hallmark of older facilities, because they are not subject to modern plant air pollution control standards, and therefore enjoy an economic advantage over newer sources. Although the retirement of equipment that has reached the end of its useful life is a part of the normal business cycle, this has not occurred with power plant facilities, because of the Clean Air Act loophole. In addition to the pure economics ? it?s cheaper to run an uncontrolled plant than a newer controlled plant ? the continued existence of older dirty plants means that there can be ?no room in the

airshed? even for newer cleaner plants. In clean air areas, for example, there are maximum allowable increases in pollution and maximum concentrations of particular regulated pollutants. If there is an older uncontrolled source in an area, even bringing a new clean source on line can bump into these ceilings. By contrast, permanently retiring the old dirty unit would allow newer cleaner units to take its place, producing the same MW with fewer air emissions.

II. The Power Plant Permitting Process Must Include Procedural Protections That Serve as Environmental Protections ? Interagency Environmental Reviews, Opportunities for Public Comment and Meaningful Opportunities to Challenge Unacceptable Permit Approvals

New conventional pulverized coal power plants will cause considerable environmental damage and harm to human health. These plants emit high levels of NOx, SO2, and toxic mercury. Nitrogen oxides emissions alter human lung function, increase human susceptibility to respiratory illnesses, contribute to the formation of ozone smog and regional haze, and cause nitrogen saturation in forests and coastal waters. Sulfur emissions threaten our public health (contributing to asthma attacks, heart disease, lost workdays, school absences, and thousands of premature deaths each year) and degrade our environment (causing hazy parklands and city skylines, and acid rain-damaged ecosystems). Mercury contamination in fish is so prevalent that the health departments in forty states, cognizant of the severe neurological damage that mercury can cause in children, have issued thousands of fish consumption advisories. Collectively, these three air pollutants from conventional coal-fired power plants have damaged human health, wildlife, forest ecosystems and agriculture, water quality, and visibility.

Harmful emissions are only part of the problem, however. Conventional American coal plants also use tens of trillions of gallons of cooling water each year, altering ecosystems and killing countless fish and other organisms that are drawn into the plants? intake structures. Public health and environmental quality are threatened by dust and sediment that escapes from the coal piles that surround plants and from the trucks and trains that supply them. More than 100 million tons of highly toxic fossil fuel combustion waste ? ash, slag, and scrubber sludge ? contaminates our air, groundwater, and surface waters each year. Large tracts of land are consumed for the siting of coal plants and their associated storage areas, and our transportation infrastructure is taxed by the plants? ceaseless demand for coal deliveries. Finally, the coal industry?s reliance on surface mining techniques causes irreparable damage to local ecosystems and communities.

a. Interagency Environmental Reviews Must Be Preserved.

Several federal and state agencies are charged with overseeing and permitting the development of energy facilities, including power plants, and the extraction and use of natural resources such as coal, gas, and oil for the generation of electricity. These processes are regulated by the agencies under an interconnected set of federal environmental laws. Each of these laws ? including the Clean Air Act, the Clean Water Act, the Federal Land Policy and Management Act, the Endangered Species Act, and others ? reflect carefully constructed balances, both internal to themselves and as they relate to other environmental laws. Congress, in crafting each of these statutes, ensured that the nation?s need for economic growth (including the energy demand increases which fuel that growth) would be considered in light of the need for environmental protection, and that the process would invite public participation. Federal permit programs like Title V, NSR, and PSD are the manifestation of Congress?s intent to balance competing interests. As the practical embodiment of meticulous Congressional compromise, these permit programs are worthy of considerable deference. They cannot properly be characterized as ?impediments? to development ? as the CEQ notice does. Nor is it legal or even appropriate for these rules to be changed at the behest of an appointed Task Force, without full notice and comment rulemaking and if necessary, legislative action.

b. The Interagency Task Force May Not ?Streamline? Away Meaningful Opportunities for Public Participation in the Process Leading to Permit Issuance or in the Administrative and Judicial Review of Granted Permits.

At least one industry representative argued, in the context of the NSR 90-day review proceeding, in favor of doing away with current procedural requirements that the issuance of PSD permits be stayed pending the administrative and judicial review process. This suggestion would eviscerate the public?s ability to participate meaningfully in permit review and appeals. Not only are such draconian results unnecessary, as we point out above, but, we assert, such an outcome would be against the law.

In particular, the argument is made that it is necessary to modify the current procedural requirement that various environmental permits cannot be issued ? and therefore construction of a facility cannot begin ? until the Environmental Appeals Board process is completed. Currently the rules result in an automatic stay of permit issuance during the time period between the granting of a permit and the deadline for challenges to that decision. The issuance of a permit is further stayed during any appeal. The effect of the current stay process is that significant investment in plant development cannot begin until after the appeals process is complete.

Changing the automatic stay provision, either by removing it completely and allowing a permit to issue immediately upon approval, or by making a stay pending completion of the appeals process available only on the specific order of the Agency, would effectively remove the public?s ability to meaningfully participate in the permit and appeals process. For if a permit were issued and construction begun before the appeals process were complete, and the permit were remanded or revoked as a result of the administrative/judicial review process, who would be responsible for the sunk costs (both economic and environmental) already in the ground on that plant? If the answer is the party contesting the permit, that outcome would effectively stifle the private attorney general functions of non-profit citizens organizations ? which are fundamental to the framework of many federal environmental statutes.

Calpine argues that it tries to develop the cleanest possible generating technologies, but that the procedural protections incorporated in the automatic stay process have cost it delay and dollars. While we might be sympathetic to the argument that construction of the cleanest, most efficient generating facilities is desirable, we do not believe that this should ? or legally can ? occur at the cost of bypassing meaningful opportunities for public participation in the permitting and appeals process. That process is part of the transfer of portions of the bundle of rights in property and the public airshed, between the public and the applicant. The applicant receives, as the outcome of the permitting process, the right to develop the property, emit pollutants into the air and water, and generate revenue. In our democratic society in order to acquire those rights, the applicant must subject itself to public scrutiny.

Any effort to restrict or eliminate the public?s ability to participate in the permitting process furthermore would be in conflict with the central purposes of the Administrative Procedure Act (?APA?). By describing the rights and responsibilities of federal agencies and interested persons, the APA has provided structure and certainty to the procedures used by agencies in discharging their duties. The Clean Air Act, Clean Water Act, Resource Conservation and Recovery Act, and Endangered Species Act all require public involvement in permit issuing processes, and this public participation is protected by the APA. The result has been more public oversight, improved access to administrative decision-making processes, and an increasingly responsible federal bureaucracy. Each of these fundamental achievements of modern American administrative law would be threatened if the public?s right to consider and critique agency permitting decisions were to be limited in order to expedite the issuance of permits. Furthermore, the APA requires that ?any person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial

review thereof.? No change to the rules governing permitting or permit appeals legally may have the effect of denying or stifling the public?s right to seek redress for wrongly decided permitting decisions.

c. If the Permitting Process is to be Improved, Additional Public Health and Environmental Analyses Should Be Required of the Applicant as a Prerequisite to Permit Issuance.

The current permitting process fails to incorporate recent advances in the understanding of local adverse health impacts due to coal-fired power plants. First, although the national ambient air quality standard for fine particulate matter (PM2.5) is not yet formally required to be taken into account in the permitting process, the science that led EPA to adopt that standard provides overwhelming evidence that PM2.5 is linked to a variety of adverse health outcomes including increased asthma attacks, respiratory and cardiac emergency room visits, hospitalizations, and even premature death. Recent studies have quantified the specific impacts associated with emissions from a particular power plant or plants. Second, although EPA has declined to set a short-term SO2 National Ambient Air Quality Standard, it recognized that the current standards are insufficient to protect people with asthma living in the vicinity of power plants from significant adverse health impacts caused by peak exposures due to plume ?strikes.? EPA has issued guidance to the states as to how to address this risk on a case-by-case basis. Current permitting processes fail to protect communities from these short-term peak SO2 exposures. Lastly, new coal plants must meet a specific technology standard for hazardous air pollutants (HAPs) under the Clean Air Act. However, unlike the standards applicable to existing HAP sources, new sources are not currently subject to a ?residual risk? analysis to determine whether they pose unacceptable risks to the local community. If the permitting process is to be changed, it should be strengthened to require assessment of and adequate protection against each of these risks.

d. Permitting Processes Also Could be Improved by Expanding Notice Requirements to Include all Downwind States and Communities.

Currently, PSD and Title V permitting rules include requirements that notice about the availability of the permit application and other information submitted by the applicant, as well as notice of the public hearing, be provided to all persons in the area where the proposed source is located. But pollution from these plants can travel great distances. Furthermore pollution transport science has become clear. In order to give adequate notice to all persons potentially affected by a new power plant, the rules should require notification not only within the area where a source is to be located, but also to all potentially affected downwind communities and states as well.

III. The Interagency Task Force Must Include Environmental Representatives? Voices

The CEQ Notice requesting comment on the proposed Interagency Task Force suggests that the Task Force will be composed of representatives from the various federal agencies, as well as ?such other representatives as may be determined by the Chairman of the Council on Environmental Quality.? We respectfully suggest that environmental and public health organizations, particularly organizations active ?in geographic areas where increased permitting activity is expected,? deserve to have their voices represented on the Task Force. We therefore request that these organizations be offered the opportunity to participate in the Task Force deliberations.

Respectfully submitted,

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